

9528.1987(10)

CEMENT KILN BURNING HAZARDOUS WASTE FUELS DURING INTERIM STATUS

SEP 3 1987

Mr. Grant Trigger
Clark, Klein & Beaumont
1600 First Federal Building
1001 Woodward Avenue
Detroit, MI 48226-1962

Dear Mr. Trigger:

This is in response to the April 1, 1987 request on behalf of the St. Mary's Peerless Cement Company of Detroit, Michigan (St. Mary's) for an opinion on whether the St. Mary's cement kiln qualifies for interim status to burn hazardous waste fuels under section 3005(e) of the Resource Conservation and Recovery Act, (RCRA) as amended. This letter also responds to the arguments raised on behalf of Petro-Chem Processing, Inc. (Petro-Chem), opposing any interpretation of section 3005(e) that would allow St. Mary's to begin operation prior to receiving a RCRA permit.

Conclusion

On the basis of the information submitted by St. Mary's we believe that St. Mary's may qualify for interim status under section 3005(e). The remainder of this letter discusses our interpretation of the section 3005(e) requirements as they pertain to the St. Mary's facility and the conditions under which St. Mary's may obtain interim status.

Background

Under section 3005(a) of RCRA, no facility may treat, store, or dispose of hazardous waste without a permit after November 19, 1980. However, under section 3005(a), a facility may be treated as if it had a permit for the interim period pending review of its permit application. To operate under this "interim status," a facility must meet three conditions: (1) the facility must be "in existence" either on November 19, 1980 or on the effective date of statutory or regulatory changes under RCRA that subject it to the permit requirement, (2) the facility must comply with

applicable notification requirements under section 3010(a) of RCRA, and (3) the facility must submit a Part A permit application. Section 3004(q)(2)(C) requires that any cement kiln located within a municipality of greater than 500,000 population that burns fuel containing any hazardous waste after November 8, 1984 must be treated as a hazardous waste incinerator. Such kilns were not subject to RCRA permit requirements prior to November 8, 1984.

St. Mary's is a cement kiln located within the boundaries of the city of Detroit, Michigan, a city of greater than 500,000 population. In 1982, St. Mary's conducted a trial burn of waste-derived fuels as part of its developing secondary fuels program. Between 1982 and 1986, St. Mary's and the fuel supplier who had provided fuels for the 1982 test burn continued to discuss the prospect of future burning of hazardous waste fuels. In early 1987, St. Mary's contracted for waste-derived fuels from that waste fuel supplier. To burn hazardous waste fuels, St. Mary's does not need to process or store the fuels on-site, and no modification of the facility is necessary. St. Mary's has not submitted a Part A permit application or a 3010(a) notification.

Discussion

1. Interim Status under Section 3004(q)(2)(c)

The basis for St. Mary's argument that it qualifies for interim status for its fuel-burning operations is that it was "in existence" on November 8, 1984, the date of the statutory amendment adding section 3004(q) to RCRA, which was the statutory change subjecting the cement kiln to RCRA permit requirements as a hazardous waste incinerator.

Although the language of section 3004(q)(2)(C) appears only to require big city cement kilns to comply with incinerator standards, whether as an interim status or permitted facility, comments by the author of this amendment of the floor of the House indicate that the intent of this paragraph was to prevent cement kiln operation in big cities until permitted as a hazardous waste incinerator. 129 Cong. Rec. H 8154 (daily ed. October 6, that under section 3004(q)(2)(C), St. Mary's may not operator under interim status.

However, on its face, section 3004(q)(2)(C) only requires that big city cement kilns burning hazardous waste fuels "fully compl[y] with regulations...which are applicable to incinerators. Incinerators may operate under interim status standards. Nothing in the statutory language suggests any limitation on the ability of big city cement kilns to operate pursuant to interim status, as would any other existing hazardous waste incinerator.

Because the statutory language is unambiguous with respect to this issue, we believe that it is inappropriate in this context to imply limitations solely on the basis of legislative history. Therefore, section 3004(q)(2)(C) does not prevent St. Mary's from operating pursuant to section 3005(e).

2. Interim Status Requirements - "In Existence"

The first of three interim status requirements is that St. Mary's must have been in existence on the date of a statutory or regulatory change that subjects it to RCRA permit requirements. St. Mary's argues that the change that rendered St. Mary's subject to RCRA permitting and thus eligible for interim status, was the enactment of section 3004(q)(2)(C) on November 8, 1984 which made certain kilns hazardous waste incinerators.

Under 40 C.F.R. 260.10, EPA defines "in existence" to mean that either the facility is "in operation" (i.e., actually "treating, storing, or disposing of hazardous waste") or a facility "for which construction has commenced" on the relevant date.^{1/} Because St. Mary's was not burning hazardous waste on November 8, 1984, it must be a facility for which construction had commenced on that date in order to qualify as an existing facility.

Under section 260.10, a facility is "under construction" if it has received all hazardous waste control approvals necessary for physical construction and either a continuous, on-site construction program has begun or the facility has accepted substantial contractual obligations for such construction, to be completed within a reasonable time. St. Mary's did not need to undertake any modification of its facility to convert to hazardous waste fuels. Although not directly addressed by the regulations, EPA has interpreted "under construction" also to include facilities that have completed construction on the relevant date. See 46 Fed. Reg. 2344 (January 9, 1981). Under this interpretation,

since no modification of the facility was necessary, St. Mary's

1/ Section 260.10 only defines "existing facility" in terms of facilities in existence on November 19, 1980, the only relevant date for interim status prior to the Hazardous and Solid Waste Amendments of 1984 (HSWA). HSWA amended section 3005(e) to allow facilities also to obtain interim status if they were in existence on the date of statutory or regulatory changes which subject them to RCRA permitting. Although the Agency has not yet made the conforming change to its regulations defining "existing facility" to reflect the HSWA change to section 3005(e), EPA interprets the same definitions to apply to all facilities "in existence" under section 3005(e)(1)(A)(ii).
may qualify as an "existing facility" if it can objectively demonstrate an intent to handle hazardous waste within a reasonable time after November 8, 1984. See id.

St. Mary's demonstration of intent primarily includes a 1982 test burn of hazardous waste fuels as part of a secondary fuels program at the facility and verbal agreements with the fuel supplier, beginning prior to the test burn and continuing through 1986 when they were reduced to a written contract, signed in early 1987. Based on this information, St. Mary's has objectively demonstrated an intent to handle hazardous waste within a reasonable time after November 8, 1984, and thus was an "existing facility" on that date.

3. Interim Status Requirements - Submission of 3010(a) Notice

The second condition for interim status is that a facility must comply with any applicable notification requirements under RCRA section 3010(a). Because there are no 3010(a) notification requirements applicable to St. Mary's the facility has complied with this requirement.

Petro-Chem argues that St. Mary's was required to file a notification under the 1984 amendment to section 3010(a). Section 3010(a) requires notification by February 8, 1986 for any facility that produces, burns, or distributes hazardous waste fuel. However, this requirement applies only to facilities

actually handling hazardous waste fuel on November 8, 1986; see 52 Fed. Reg. 11,819 (April 13, 1987)).

This section 3010(a) notification is intended to be a "snapshot" of current hazardous waste fuel production, distribution, and burning. H.R. Rep. No. 198, 98th Cong., 1st Sess 40 (1983). Contrary to Petro-Chem's suggestion, EPA did not intend to imply in the April 13, 1987 notice clarifying this requirement that "under construction" facilities must provide such notices. Rather, the purpose of this notice was to clarify that the hazardous waste fuel notification requirement should be interpreted consistent with earlier section 3010(a) notifications, and thus that the requirement applied only to facilities actually handling the hazardous waste on the relevant date. See 45 Fed. Reg. 76,631 (November 19, 1980);

4. Interim Status Requirements - Submission of Part A

The final condition for interim status is that the facility submit a Part A permit application. Under 40 C.F.R section 270.10(e), existing facilities must submit the Part A no later than six months after the publication of regulations requiring compliance with technical standards, or thirty days after they first become subject to the technical standards.

Because St. Mary's has not filed a Part A permit application, the facility does not now qualify for interim status. However, the regulations under section 270.10(e) are unclear about when the submission of the Part A should have been made. In fact, a possible reading of the regulations suggests that the Part A would not be due until 30 days after St. Mary's actually begins burning hazardous waste fuels. Although we believe that the permit application was due within 30 days after St. Mary's became subject to RCRA requirements on November 8, 1984, we acknowledge that there could be substantial confusion for cement kilns subject to RCRA under section 3004(q)(2)(C) and that the confusion may be attributable to serious ambiguities in the interim status and hazardous waste fuels regulations with respect to these facilities.

As a result, EPA has decided to exercise its discretion under section 270.10(e)(2) of its regulations to extend the date for Part A submission by Federal Register notice for cement kilns

subject to section 3004(q)(2)(C). Because St. Mary's has met all of the other requirements for interim status, the facility will be able to operate pursuant to section 3005(e) if it complies with the Part A submission requirements in the Federal Register notice, to be published in the next few days.

As a matter separate from the ability of St. Mary's to obtain interim status, the Agency believe that recycling, reuse, recovery, and treatment of hazardous wastes are the preferred management alternatives. Cement kilns have demonstrated that they can effectively recover energy from certain hazardous wastes and fuels containing hazardous waste while, at the same time, greatly reducing the quantity of waste materials. Therefore, the Agency believes that if St. Mary's obtains interim status, environmental benefits will result from the energy recovery and waste treatment that will be performed, and the operation of the facility will be held to the relevant interim status and state standards for incinerators.

Thank you for the information you provided to the Agency regarding the situation of St. Mary's cement kiln. If you have any further questions or comments on this issue, please contact Frank McAlister of the Office of Solid Waste (202-382-7706). Caroline Wehling of the Office of General Counsel (202-382-7706).

Sincerely,

Marcia E. Williams
Director
Office of Solid Waste